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No. 80-1725

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

BENNETT GOLDSTEIN and JAMES EDWARD KERN

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a police officer must have reasonable suspicion that a crime is afoot before he may seize and remove locked personal luggage from an airline baggage cart in order to subject the luggage to an examination by a police K-9 unit trained to locate drugs.

2. Whether, under the Fourth Amendment, a search has occurred when the police used a specially trained K-9 unit to sniff and examine locked, personal luggage, with the sole purpose of determining its contents.

3. Whether a conviction by a jury for possession of a controlled substance with the intent to distribute can stand when no evidence of the element of an intent to distribute was presented to the jury.

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REFERENCE TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is United States v. Goldstein, et.al., reported at 635 F.2d 356 (5th Cir. 1981) (A. 1-15). The order denying rehearing is not reported, and is attached hereto at A.16.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on January 26, 1981, affirming the convictions of the petitioners, (A. 1-15). Petitioners' petition for a rehearing and suggestion for a hearing en banc was timely filed and was denied on February 25, 1981. (A. 16.) This petition is timely filed.

The jursidiciton of this Court is invoked pursuant to 27 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE

On May 29, 1979, agents for the Drug Enforcement Administration (DEA) observed petitioners Goldstein and Kern in the Orlando International Airport, and became suspicious that they might be involved in transporting a controlled substance. DEA Agent Maroney decided to determine the contents of the luggage the petitioners had checked in at the ticket

counter by having a narcotics-trained K-9 unit dog examine the bags. The agents entered the baggage handling area and removed the petitioners' luggage from the baggage carts in order to facilitate the police K-9 unit's examination. After receiving a positive alert from the police dog, DEA Agent Wingfield arrested the petitioners, informed them of the positive reaction and asked for consent to search their luggage. After permission was denied as to one piece of luggage, the agents obtained a search warrant based on the positive alert by the dog. The bag was found to contain one plastic bag of cocaine and various items of clothing.

A Motion to Suppress Evidence was timely filed by both petitioners on

23 July 1979, and after a hearing, the motion was denied on August 15, 1979.

At trial, although petitioners were charged with possession with intent to distribute the seized cocaine, 21 U.S.C. §841(a)(1), [1] absolutely no evidence of intent to distribute was offered. The sole fact upon which the government relied to establish that ele-

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[1] Title 21 U.S.C. §841(a)(1) states:

> (a) Except as authorized by this sub-chapter, it shall be unlawful for any person knowingly or intentionally -
>
> (1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; ...

ment for the jury was the weight of the substance. Absolutely no testimony was offered to give that weight any significance. On September 12, 1979, the jury found Goldstein and Kern guilty of possession with intent to distribute cocaine. At that time the court denied petitioners' Motion for a Judgment of Acquittal and New Trial. They were each subsequently sentenced to serve six years in the federal penitentiary.

Petitioners filed a Notice of Appeal November 5, 1979. After argument, the Court of Appeals for the Fifth Circuit issued an opinion affirming their convictions. (A. 1-15). On February 6, 1981, the petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc. This petition was denied on February 25, 1981. (A. 16-17).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE IS IN DIRECT CONFLICT WITH ANOTHER PRIOR UNITED STATES COURT OF APPEALS DECISION AS TO AN IMPORTANT FOURTH AMENDMENT ISSUE.

In the recent case of Delaware v. Prouse, 440 U.S. 648, (1979), this Court stated that:

> [t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law-enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasion...' (footnotes and citations omitted).
>
> * * * * * * *
>
> ...the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard" whether this be probable cause or a less stringent test. (Footnotes omitted.)

In its opinion, the Court of Appeals held that police officers did not need any reasonable suspicion that locked suit-

cases contained evidence of a crime before removing them from an airline baggage cart for further examinaton by a police K-9 unit. (A. 10-12.)

Specifically, the Court stated:

> [o]ur review of the record reveals that the DEA agents were in the semi-public baggage area with the permission of National [Airlines]. Once Kern and Goldstein released their luggage to the custody of the airlines, they could no longer control who actually handled their bags. We hold that, because the DEA agents' placement of the two bags in a position to be sniffed did not violate [petitioners'] privacy interests in the contents of their bags, their actions in doing so did not constitute an unreasonable seizure within the meaning of the Fourth Amendment. See United States v. Klein, supra, 626 F.2d at 26; United States v. Burns, supra, 624 F.2d at 101; see also, United States v. Venema, 563 F.2d at 1006.

(A. 10-11.) [2] By so holding, the court has departed from persuasive authority to the contrary, and has now permitted the police to take substantial intrusive investigatory action against individuals and their property without any founded or reasonable suspicion that criminal conduct is afoot. Accordingly, there is now a serious division in the Courts of Appeal on this very important Fourth Amendment issue in need of resolution.

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[2] In fact, the record of the suppression hearing makes no mention of any permission being granted by National Airlines for the seizure of the petitioners' baggage, nor is there any evidence that the baggage cart was in a semi-public area. The only mention of any permission being granted was at trial, at a time when the issue of permission was irrelevant. Accordingly, at trial no evidence was presented by the defense to rebut the issue. Furthermore, even at trial, the permission discussed was not specifically geared toward the petitioners' baggage, but was a more generalized understanding between the DEA and the airlines.

In United States v. Klein, 626 F.2d 22,27 (7th Cir. 1980), under circumstances very similar to those in this case, the court held that a bag checked in at an airport cannot be detained while police wait for a dog trained in detecting narcotics, unless the agents who were detaining the bags had a reasonable suspicion to believe that the bags contained contraband. In reaching its decision the Court stated:

> [o]ur research has uncovered no case in which a court has confronted a detention situation precisely like the one before us now, but the Supreme Court did address an analogous situation in U.S. v. Van Leeuwen, 397 U.S. 249 ...(1970), where it extended the Terry logic to the detention of parcels of mail believed to contained contraband.

Id. at 25.

In Van Leeuwen, as in Klein, the detention or seizure of the property

only occurred after police had reasonable suspicion to believe that a crime was afoot. There, mail was taken out of its normal traffic flow and subjected to a temporary detention because police officers had a reasonable suspicion that the packages contained contraband. This Court analogized that situation to the then recently sanctioned temporary detentions in Terry v. Ohio, 392 U.S. 1 (1968).

Since the Van Leeuwen and Terry cases, this Court has repeatedly required some restraints, specifically an "articulable suspicion" on the part of government agents, to ensure that intrusive surveillance and investigatory techniques are not used in a random or unprincipled fashion, or left to the unbridled discretion of the agent. See Delaware v. Prouse, 440 U.S. at 661;

Brown v. Texas, 443 U.S. 47,51 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); cf.: Reid v. Georgia, ___U.S.___, 65 L.Ed.2d 890, 893-894 (1980). "[S]tandardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." Delaware v. Prouse, 440 U.S. at 661 (citations omitted).

Here, the petitioners' baggage was taken out of the normal flow of traffic, removed from the baggage cart, and subjected to a detention while the police brought in their narcotics trained K-9 unit to examine them. The Court of Appeals has not required that the officers have reasonable suspicion prior to seizing the bags. The officer's action was permitted even if based on a mere

hunch, or even if it were random and indiscriminate. Such a holding is inconsistent with this Court's decision in Van Leeuwen, in direct conflict with the Seventh Circuit's decision in United States v. Klein, supra, and invites intrusions upon constitutionally guaranteed rights based on nothing more substantial than the officer's peculiar prejudices or inarticulate hunches. See Terry v. Ohio, 392 U.S. at 23; Delaware v. Prouse, 440 U.S. at 661. A writ of certiorari should be granted in order to resolve this issue.

II.

THIS CASE SQUARELY RAISES AN IMPORTANT ISSUE UNDER THE FOURTH AMENDMENT WHICH WAS DECIDED IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN KATZ V. UNITED STATES.

In its opinion the Fifth Circuit adopted standards that conflict with the decision in Katz v. United States, 389 U.S. 347 (1967), concerning

the fundamental protections guaranteed by the Fourth Amendment. In this case, the court determined that when a police dog, under the direction of government agents, touched, smelled and examined the exterior of locked personal luggage, with the sole purpose of determining its contents, no search occurred despite the owner's reasonable expectation of privacy in the contents of that luggage. The court's opinion relied upon the fact that the dog's nose did not physically penetrate into the interior of the luggage. This decision resurrects a barrier to Fourth Amendment protections that was long ago abolished in Katz v. United States.

In Katz, the Court was faced with the issue of whether a search had occurred when a police officer placed an electronic listening device, which greatly magnified the officer's hearing

ability, outside a telephone booth in order to overhear a gambling suspect's telephone conversation. The government argued that the defendant had no expectation of privacy in the booth because it was made of glass and was in a public place. Under the government's theory, there had been no invasion of privacy since the listening device had not physically penetrated the phone booth. Rejecting the "trespass test" as the sine qua non of an unconstitutional search, the Court stated:

> the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection ... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351-52 (citations omitted)(emphasis added). As to the

government's second contention, the Court stated that "the fact that the electronic device employed ... did not happen to penetrate the wall of the booth can have no constitutional significance." 389 U.S. at 353. Accordingly, the Court held that even though it did not penetrate the booth, the government's use of a device to discern normally imperceptible sounds was a search within the reach of the Fourth Amendment. 3/

In so holding, the Court in Katz expressly overturned an earlier line of

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3/ In construing this central holding of Katz, subsequent courts have similarly concluded that one's reasonable expectation of privacy can be invaded by the improper use of sophisticated sensory enhancement devices. For instance, in United States v. Kim, 415 F.Supp. 1252, 1256 (D.Hawaii 1976) the court suppressed evidence obtained as a result of the warrantless use of a telescope, stating:

> A "plain" plain view of Kim's apartment was impossible; only

(Footnote continued on following page.)

cases which required a physical trespass by the government as an essential element for establishing an unlawful search by the use of sensory enhancement aids. 4/

> In the course of repudiating the doctrine derived from Olmstead v. United States...and Goldman v. United States..., that if police officers had not been guilty of a commonlaw trespass they were not prohibited by the Fourth Amendment from eavesdropping, the Court

(Footnote continued from previous page.)

> an aided view could penetrate. In view of the powerful technology used by the law enforcement agents in this case, the "plain" in plain view must be interpreted as permitting only an unaided plain view.

See also People v. Arno, 153 Cal.Rptr. 624, 625-26 (Cal.App. 1979); United States v. Taborda, 635 F.2d 131 (2d Cir. 1980); State v. Ward, 617 P.2d 568 (D.Hawaii 1980).

4/ See Goldman v. United States, 316 U.S. 129 (1942)(upholding government agents' use of an electronic listening device which enhanced sound, so long as there was no physical intrusion or trespass accompanying the surveillance); see also United States v. Lee, 274 U.S. 559 (1927); Olmstead v. United States, 277 U.S. 438 (1928).

> in Katz held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. (citations omitted) Rakas v. Illinois, 439 U.S. 128, 143 (1978).

Subsequently, "this Court has repeatedly repudiated the notion that 'arcane distinctions developed in property and tort law' ought to control our Fourth Amendment inquiry." United States v. Salvucci, 448 U.S.___, 65 L.Ed 2d 619, 627 (1980), citing Rakas v. Illinois, 439 U.S. 128,143 (1978). See also Rawlings v. Kentucky, 448 U.S. ____, 65 L.Ed 2d 633 (1980).

This case is indistinguishable from Katz. [5/] Here, as the Court of

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[5/] If anything, the government intrusion this case was actually more egregious than in Katz since the agents in Katz were assumed to have had probable cause prior to installing the listening (Footnote continued on following page.)

Appeals decision made abundantly clear, the petitioners had a reasonable expectation of privacy in their bags. "[E]very passenger who has luggage checked with an airline enjoys a reasonable expectation of privacy that the contents of that luggage will not be exposed in the absence of consent or a legally obtained warrant." (A. 9) (emphasis in original). In Katz, the defendant had a reasonable expectation that the contents of his conversation would remain outside the realm of public knowledge. Here, the petitioner's luggage was in a semi-public place, but only its exterior was visible. In Katz, the defendant

(Footnote continued from previous page.) device. If this use of a K-9 unit does not violate the Fourth Amendment, then dogs are living general warrants which police may use at will to search. Failure to review this case will nourish police intrusions more extensive than those which would have followed a different ruling in Katz.

was in a public glass telephone booth but only he was visible to the public. Here, the contents of the luggage could not be detected by ordinary human sensory perceptions. [6] In Katz, the defendant's conversation could not be detected by ordinary human sensory perception. Here, the government used a sensory enhancement aid in order to determine the contents of the luggage. [7] In Katz, the government

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[6] Unlike several marijuana cases, this record is completely devoid of any evidence that any human olfactory sense could detect this substance under any condition.

[7] The record below made clear that a dog's olfactory senses are at least 1,000 times that of an ordinary human. Certainly, that is a more sensitive and effective tool of invasion than the electronic listening device on Katz' phone booth, or the telescope in Kim, supra.

In an analogous case, Jones v. Latexo Independent School District, 499 F.Supp. 223,232-33 (E.D.Texas 1980), the Court pointed out that a dog is

(Footnote continued on following page.)

used a sensory enhancement aid in order to determine the contents of his conversations. In both cases the sensory enhancement aid was applied to the exterior of an enclosure used to keep the public from intruding into that which was sought to be kept private. In both cases, the sensory enhancement aid did not physically intrude into the private enclosure. It was merely a passive receiver

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(Footnote continued from previous page).

able to detect odors completely outside the range of the human sense of smell. The dog thus replaced, rather than enhanced, the perceptive abilities of school officials. In that respect, the dog was far more analogous to an electronic "bug" than to a flashlight, which merely augments human sight in particular lighting conditions.

The dog's inspection was virtually equivalent to a physical entry into the students' pockets and personal possessions. In effect, he perceived what the students had secreted and communicated that information to his handler.

that disclosed the nature of that which was otherwise hidden from public knowledge, from a vantage point outside of the protected enclosures. In this case the sensory enhancement aid deciphered odiferous molecules in the surrounding air; in Katz it deciphered sound waves in the surrounding air. The differing results in this case and in Katz are attributable solely to the Court of Appeals' rejection of the rationale in Katz that: "the reach of the Amendment can not turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S. at 353.

The Court of Appeals decision effectively takes Fourth Amendment law back to pre-Katz decisions and would allow random intrusions of an individual's protected privacy interests. If this decision stands, then in any future case involving the use of a highly

sensitive sensory enhancement aid, a new exception to the probable cause requirement will have been created. No search will be determined to have occurred as long as the sensory enhancement aid did not physically intrude into the protected area, but merely deciphered the sound waves, light waves or other normally imperceptible emanations. The ramifications of such a result are far-reaching and of great effect. 8/

8/ The opinion below did not distinguish between the use of a dog to reveal the contents of luggage from the use of trained dogs to reveal the contents of a pocket, hotel room, or a home. It found, instead, that there was no search.

In Olmstead v. United States, supra at 478-479 Justice Brandeis commented:

> ...every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment.
>
> ...It is, of course, immaterial where the physical connection with the telephone wires leading into the defendant's premises was made. And it is also immaterial that the intru-

(Footnote continued on following page.)

Over fifty years ago, in Olmstead v. United States, supra at 473, Justice Brandeis observed:

> Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.
>
> The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping ... 'that places the liberty of every man in the hands of every petty officer,' was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intru-

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(Footnote continued from previous page.) sion was in aid of law enforcement. Experiences should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding. (Footnote omitted)

> sion seemed 'subversive of all comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?

This case raises again the question that troubled Justice Brandeis, and which seemed to have been answered by the Court in Katz and its progeny. The Fourth Amendment does offer protection to those persons who have a reasonable expectation of privacy from government intrusions. United States v. Salvucci, 65 L.Ed 2d at 628; Rakas v. Illinois, 439 U.S. at 140; Rawlings v. Kentucky, 65 L.Ed 2d at 641. Here, the petitioners had a recognized expectation of privacy in the contents of their luggage and this expectation was illegally invaded when the police searched the luggage with a K-9 unit. 9/ Certiorari should be granted

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9/ It is well established that a warrantless search is per se imper-
(Footnote continued on following page.)

because the conflict between this case and Katz v. United States is irreconcilable.

III.

THE DECISION IN THIS CASE IS IN CONFLICT WITH THIS COURT'S PRIOR DECISION IN RE WINSHIP.

The decision in this case carved an exception to Re Winship, 397 U.S. 358 (1970), such that proof beyond a reasonable doubt of each element of the offense is no longer required in drug cases.

The Fifth Circuit's opinion ignored Winship in order to uphold a conviction under 21 U.S.C. Section 841(a), in the absence of any proof of the cru-

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(Footnote continued from previous page.) missible unless some carefully delineated exception to the warrant requirement exists. See, e.g., United States v. Chadwick, 433 U.S. 1 (1977); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chimel v. California, 395 U.S. 752 (1969); Arkansas v. Sanders, 442 U.S. 753 (1979). Here there was a warrantless search and no exception to the warrant requirement existed.

cial element of intent to distribute. None of the normal and easily produced types of evidence used to establish intent was offered. 10/ Instead, the jury was left with the sole fact that the petitioners jointly possessed a single plastic bag containing one and one-third pounds of a controlled substance. They were completely without facts from which to determine the significance, if any, of that weight. The jury was simply left to speculate as to what uses the substance in evidence could be put.

There is no proper reason for suspending this element of proof. In fact, courts have specifically refused to allow convictions to stand where the only proof of intent was the quantity of the

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10/ There was no evidence as to the approximate purchase price, probable street value, number of dosages of cocaine, nor any other factors indicating an intent to distribute.

substance possessed. United States v. Clayborn, 383 F.Supp. 1186 (W.D. Texas 1974) (161 grams of heroin) [11]; United States v. Owens, 344 F.Supp. 1355 (W.D. Texas 1972), aff'd, 475 F.2d 759 (5th Cir. 1973) (26 grams heroin). Other courts have implicitly noted that quantity becomes meaningful only when combined with a way to evaluate it. [12] Most

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[11] In United States v. Clayborn, 383 F.Supp. at 1187, n.1, the court noted:

> This court gave fair warning in Owens that it will not, as trier of fact, guess a defendant into the penitentiary any more that it will permit a jury to do so. Proof beyond a reasonable doubt as to each and every element of an offense charged remains the standard to which this court will adhere in the trial of all criminal cases.

[12] See, e.g., United States v. Wilkerson, 478 F.2d 813, 815 (8th Cir. 1973) ("from the proof regarding value, the jury could infer whether defendant possessed the marijuana with the intent to distribute or merely with the intent to use the contraband himself"); United

(Footnote continued on following page.)

courts, however, simply cite the evidence which, combined with quantity, supports a finding of intent to distribute. 13/

(Footnote contined from previous page.) States v. Blake, 484 F.2d 50, 58 (8th Cir. 1973) cert. denied 417 U.S. 949 (1974) ("The validity of such an inference depends on whether the amount and value of the controlled substance will support an inference of intent to distribute as distinguished from mere possession for personal use."); United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978), cert. denied, 439 U.S. 1079 (1979) (353 grams of cocaine, combined with a value of $29,000, supported guilty verdict); United States v. Moore, 452 F.2d 569, 573 (6th Cir. 1971), cert. denied, 407 U.S. 910 (1972) ("The large quantity of material in the can considered together with the expert testimony concerning methods of ingesting hallucinogens ... warranted an inference of an intent to sell").

13/ See, e.g., United States v. DiNovo, 523 F.2d 197, 202 (7th Cir.), cert. denied, 423 U.S. 1016 (1975); United States v. Luciow, 518 F.2d 298 (8th Cir. 1975); United States v. Welebir, 498 F.2d 346 (4th Cir. 1974). The Fifth Circuit itself has decided many cases in a similar manner. See United States v. Bobo, 586 F.2d 355 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); United States v. Rogers, 504 F.2d 1079 (5th Cir. 1974), cert. denied 422 U.S. 1042 (1975); 1979); United States v. Polite, 489 F.2d 679 (5th Cir.), cert. denied, 419 U.S. 854 (1974); United States v. Raffo, 587 F.2d 199 (5th Cir. 1979).

However, decisions like the present one, in which the requirement of proof of the intent to distribute is suspended, are becoming more frequent, both in the Fifth Circuit, see United States v. Grayson, 625 F.2d 66 (5th Cir. 1980); United States v. Vomero, 567 F.2d 1315 (5th Cir. 1978), and in other circuits as well, see United States v. Nocerino, 474 F.2d 993 (2d Cir.), cert. denied, 412 U.S. 942 (1973); United States v. Burns, 624 F.2d 95 (10th Cir. 1980) cert. denied ___U.S.___, 101 S.Ct. 361 (1981); United States v. Garza-Hernandez, 623 F.2d 496, 502 n.4 (7th Cir. 1980); United States v. Nocar, 497 F.2d 719 (7th Cir.) cert. denied 419 U.S. 1038 (1974); United States v. Edwards, 602 F.2d 458, 470 (1st Cir. 1979); United States v. Rameriz-Rodriquez, 552 F.2d 883, 884 (9th Cir. 1977), cert. denied,

430 U.S. 966 (1978); United States v. Hayes, 479 F.Supp. 901, 918 (D. Puerto Rico 1979).

It is important that this Court act to stop this alarming trend, and to restore the requirement of proof beyond a reasonable doubt of each element of the offense. The fact that the intent to distribute may be obvious to trained courtroom participants does not excuse the failure to produce proof for a jury of laymen. See Henderson v. Morgan, 426 U.S. 637, 649 (1976) (White, J. concurring). Juries now will be able to conjure up proof of intent, based on no more perhaps than what they have gleaned from televised police dramas or supermarket magazines. 14/

14/ See United States v. Burns, 624 F.2d at 102 n.1, which actually approves of such a practice.

The absence of proof of intent in drug cases is in stark and inexplicable contrast to proof of value required in

(Footnote continued on following page.)

IV.

THE DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN TURNER V. UNITED STATES

Aside from its conflict with Winship, the Fifth Circuit's opinion conflicts with Turner v. United States, 396 U.S. 398 (1970). In this regard, it is similar to a line of Fifth Circuit cases beginning with United States v. Mather, 465 F.2d 1035 (5th Cir.), cert. denied, 409 U.S. 1085 (1972). 15/

(Footnote continued from previous page.) the analogous area of theft crimes. United States v. Wilson, 224 F.2d 407, 408 (4th Cir. 1980) (theft of 72 U.S. Army rifles -- conviction reversed where no evidence of a cumulative value of over $100 -- "Nor, in the absence of any proof of value, could the jury be permitted to speculate on this point merely from the appearance of the articles."); Churder v. United States, 387 F.2d 825 (8th Cir. 1968), per Justice, then Circuit Judge Blackmum; Robinson v. United States, 333 F.2d 323 (8th Cir. 1964); United States v. Barker, 313 F.Supp. 987 (D. Del. 1970); United States v. Thomas, 135 F.Supp. 662 (E.D. Pa. 1955).

15/ See United States v. Grayson, 625 F.2d 66 (5th Cir. 1980); United States v. Johnson, 469 F.2d 973 (5th Cir. 1972); United States v. Mann, 615 F.2d 668 (5th (Footnote continued on following page.)

To the extent that these cases read Turner as allowing mere quantity to establish the element of intent to distribute, see, e.g., Mather, 465 F.2d at 1037, they are in error. Far from that, the Court in Turner held that "the bare fact of possessing heroin is far short of sufficient evidence from which to infer [dispensing or distributing]." 396 U.S. at 421.

The Fifth Circuit is not alone in its misreading of Turner. See United States v. Ramirez-Rodriquez, supra, 552 F.2d at 884; United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir. 1979); United States v. Welebir, supra, 498 F.2d at 351. But compare United States v. Bycer, 593 F.2d 549 (3rd Cir. 1979).

(Footnote continued from previous page.)
Cir. 1980), cert. denied, ___ U.S. ___ (March 23, 1981); United States v. Perry, 480 F.2d 147 (5th Cir. 1973); United States v. Rodriquez, 585 F.2d 1234 (5th Cir. 1978), on rehearing, 612 F.2d 906, cert. denied ___U.S.___, 101 S.Ct. 108 (1981).

Due to the Court of Appeals' failure to require proof of an intent to distribute and due to the widespread misinterpretation and division over the meaning of Turner, this Court should issue a Writ of Certiorari to settle the issue.

CONCLUSION

For the reasons stated, petitioner requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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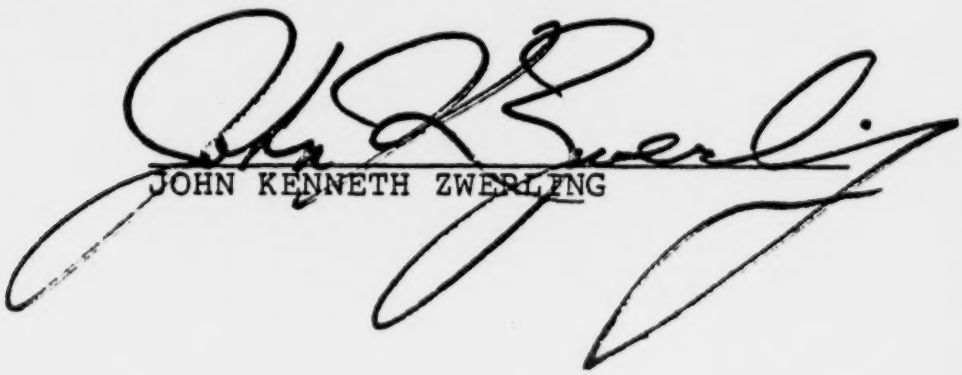
CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 1981 three true and accurate copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed, first class, postage prepaid, to the Office of the Solicitor General, Department of Justice, Washington, D.C.



JOHN KENNETH ZWERLING

APPENDIX

1980)(cocaine detected in suitcases at airport); United States v. Sullivan, 625 F.2d 9,13 (4th Cir. 1980)(PCP detected in suitcases at airport); United States v. Venema, 563 F.2d 1003,1005-6 (10th Cir. 1977)(LSD, marijuana and hashish detected in rental locker at storage company); United States v. Solis, 536 F.2d 880,882 (9th Cir. 1976)(marijuana detected in semi-trailer); United States v. Bronstein, 521 F.2d 459,461 (2d Cir.), cert. denied, 424 U.S. 918, 96 S.Ct. 1121, 47 L.Ed.2d 324 (1975)(marijuana found in suitcases at airport). Appellants urge this Court to interpret those cases as requiring at least a reasonable articulable suspicion before a suspected drug courier's luggage may be sniffed; however, we decline to apply such an interpretation for the following reasons.

APPENDIX

A.

United States v. Goldstein, ...A.-1
635 F.2d 356 (5th Cir. 1981)

B.

Denial of Petition for A.-25
Rehearing En Banc, In The
United States Court of Appeals
for the Fifth Circuit, Unit B,
(unreported)(February 25, 1981)

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bennett GOLDSTEIN and James Edward Kern,
Defendants-Appellants.

No. 79-5531.

United States Court of Appeals,
Fifth Circuit
Unit B

Jan. 26, 1981.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and FRANK M. JOHNSON, Jr., Circuit Judges, and ALLGOOD*, District Judge.

FRANK M. JOHNSON, Jr., Circuit Judge:

James E. Kern and Bennett Goldstein appeal their convictions for possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (1976). Appellants seek reversal of the district court on the grounds

*District Judge of the Northern District of Alabama, sitting by designation.

that the court erred by denying their pre-trial motion to suppress certain evidence and by denying their timely motions for judgment of acquittal. They allege that the evidence was obtained in violation of their Fourth Amendment rights and that the evidence introduced by the Government at trial was insufficient to support their convictions.

I.

On May 29, 1979, Kern and Goldstein were arrested at the Orlando International Airport by Drug Enforcement Administration [DEA] agents. At approximately 6:00 a.m. Agents Maroney and Fletcher began their Orlando Airport surveillance in the area of the Eastern Airlines' and National Airlines' ticket counters. The agents observed appellant Kern approach the National ticket counter

at approximately 6:45 a.m. Kern, who wore a beard, was dressed in a print shirt, dungarees, and boots and was carrying one large suitcase and a smaller brown one. A few minutes later, a Daniel Lynch also approached the National ticket counter; Agent Maroney became interested in the two men when he noticed that they cast side glances towards each other but did not appear to speak to each other. Kern and Lynch departed from the ticket counter separately and then engaged in a short conversation. The DEA agents learned from the National ticket agent that Lynch had purchased a ticket on National Flight #96 to Washington, D.C., and had checked his bags but that Kern, who had attempted to purchase two tickets for the same flight, decided to wait as only one ticket could be confirmed and the other was on a stand-by basis.

Agent Maroney overheard Lynch and Kern discussing the ticket problem and he noticed that shortly after Lynch departed, Kern was joined at approximately 6:51 a.m. by another man, appellant Goldstein. After Kern gave the larger bag to Goldstein and retained the smaller one they walked over to the National ticket counter. Before they purchased their tickets they began checking the flight schedules on the various airlines' T.V. monitors. When they returned to the ticket counter, Agent Maroney lined up behind them at approximately 7:00 a.m. and observed the name of Ben Goldstein on the larger bag and James Kern on the smaller bag. Maroney also noticed that, when Kern purchased the two tickets on Flight #96 to Washington, one ticket was in the name of M. Kern and the other was in the name

of J. Kern. Appellants checked the two bags and left the ticket counter.

Agent Maroney then decided to examine the luggage checked by appellants and Daniel Lynch. He met with officer Deisler and requested that Deisler bring his police dog Zeke, who was trained to detect the presence of cocaine, heroin and marijuana, to the National baggage area. Agent Maroney first removed Lynch's two bags from the baggage cart and placed them next to each other; he then placed two decoy bags on either side of Lynch's bags. Zeke positively reacted to the presence of narcotics when he began pawing, barking and attempting to bite at Lynch's two bags. The same procedure was utilized during the examination of appellants' two bags and Zeke again made a positive reaction to the two bags.

Agent Maroney informed DEA Agents Fletcher and Wingfield of Zeke's positive reaction and instructed them to question Kern and Goldstein.[1] Agent Wingfield located appellants at Gate #6; he identified himself as a police narcotics officer and asked to speak with them. Kern and Goldstein agreed and produced their tickets upon request; Kern's ticket was in the name of M. Kern and Goldstein's ticket was in the name of J. Kern. Wingfield informed them that a narcotics trained dog had positively reacted to the presence of narcotics in their luggage. Agent Wingfield asked for

1. At the motion hearing, there was some dispute about the timing of the investigatory stop and the sniff by Zeke. Appellants had claimed that they were stopped before their bags were sniffed and therefore such a stop was not justified at that point. The district court found to the contrary and appellants have not raised this issue on appeal.

permission to search their bags and appellants responded by requesting a private conference. After they conferred several feet away from the agents for a brief period of time, Kern and Goldstein indicated that they wanted an attorney. After being advised of their Miranda rights, Kern and Goldstein requested another conference. After they conferred for a moment, they were placed under arrest. [2]

After appellants were escorted to the Airport Police Office, Agent Wingfield advised appellants not to talk and at appelllants' request placed a call to

2. Agent Maroney was questioning Lynch during the interaction between appellants and the other DEA agents. Maroney informed Lynch of Zeke's reaction and received Lynch's consent to the search of his baggage. A small amount of marijuana residue was found at the bottom of each bag along with $2,500 in cash in one bag and a chemical test kit in the other. Lynch was not charged with any crime and was released.

their Virginia attorney that was answered by an answering device. Goldstein apparently made an unsolicited remark that the agents would only be interested in his bag, but it is not clear from the record whether that comment was made in the waiting area or in the police office. Agent Maroney again requested their consent to search their bags after stating that they would not be charged if the search revealed a "small quantity of drugs obviously for personal consumption"; however, Maroney did not represent that consent would render then [sic] immune from prosecution if a large quantity of drugs were found as a result of the search of the luggage.

When Officer Deisler and Zeke arrived at the police station, Zeke started sniffing appellants' two bags without prompting and again began barking and

pawing at the bags. Goldstein refused to consent to a search but Kern consented. The search of Kern's bag, conducted in the office, revealed $11,800 in cash, a glass beaker, a bottle with oil residue, small straws, a stand and the top portion of a butane torch, a thermometer, and a few items of clothing and newspapers. Goldstein and Kern were then jailed and Maroney sought a warrant in order to search Goldstein's bag. When his bag was subsequently searched, it contined $2,415 in cash, approximately two pounds of cocaine [3] in a Sears shopping bag, a few pieces of clothing and a boarding pass for a flight on the previous day from Washington to Ft. Lauderdale, Florida.

3. The subsequent analysis of the substance seized revealed that the cocaine hydrochloride weight 766 grams and that 73% (or 559 frams) was pure cocaine.

The jury found appellants guilty as charged in the one count indictment. On appeal Kern and Goldstein have alleged seven errors committed by the district court, which we will treat in order.

II.

The first four contentions raised by Kern and Goldstein relate to the district court's denial of their motion to suppress the evidence found in their suitcases at the Orlando airport. Appellants argue that their bags were detained and "sniff-searched" by Zeke solely because they matched certain characteristics of the drug courier profile. [4] They contend that since the

4. United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978) describes the drug courier profile in detail. The profile is an informally compiled abstract of characteristics thought typical of persons carrying illegal drugs. United States v. Robinson, 625 F.2d 1211, 1214 & (Footnote continued on following page.)

drug courier profile alone would not supply the reasonable and articulable suspicion [5] necessary to justify an investigatory stop, the profile, without more, cannot be used to justify

(Footnote continued from previous page.)
n.2 (5th Cir. 1980). The profile characteristics manifested by appellants were:

(1) an early morning flight when fewer drug enforcement agents are on duty, from a known source city;
(2) Kern's appearance: beard, print shirt, boots and dungarees;
(3) the side glances between Lynch and Kern appeared to be an attempt by them to belie any association;
(4) the subsequent conversation between Kern and Lynch;
(5) the exchange of luggage between Kern and Goldstein and their review of other flight schedules;
(6) The inconsistent names on the tickets and the luggage;
(7) the large amount of cash found in Kern's bag;
(8) the small amount of clothing in Kern's luggage.

5. The Supreme Court has defined reasonable and articulable suspicion as "specific articulable facts together with rational inferences from those facts." Terry v. Ohio, 392 U.S. 1,21,88 S.Ct. 1868,1879, 20 L.Ed.2d 889 (1968).

the initial detention of their luggage. Moreover, because their bags were sniffed after being removed from the National baggage cart in a non-public area for reasons other than airport security, appellants claim that such action was an intrusion and thus an unreasonable search and seizure in violation of the Fourth Amendment. They alleged that the district court erred by denying their motion to suppress the evidence found in the suitcases. We disagree.

A number of courts confronted with the issue of the use of dogs trained in drug detection have held that the use of such dogs to sniff for the presence of controlled substances in luggage and other places does not constitute a search within the meaning of the Fourth Amendment. See, e.g., United States v. Klein, 626 F.2d 22,26-7 (7th Cir.

First, Zeke's sniffing around the exterior to Kern and Goldstein's bags was not an intrusion into an area protected by the Fourth Amendment. We recognize that, when airport security is not involved, every passenger who has luggage checked with an airline enjoys a reasonable expectation of privacy that the contents of that luggage will not be exposed in the absence of consent or a legally obtained warrant. [6] See Arkansas v. Sanders, 442 U.S. 753, 764, 99 S.Ct. 2586,2593, 61 L.Ed.2d 235 (1978); United States v. Klein, supra,

6. It is clear that, because of the great danger posed to the public safety by air piracy, searches conducted in the interest of airport safety are subject to a more relaxed test of reasonableness. See e.g., United States v. Palazzo, 488 F.2d 942 (5th Cir. 1975). However, it should be noted that searches in the interest of drug enforcement cannot be justified on the same basis as those in the airport security context; instead drug searches are to be analyzed under traditional Fourth Amendment principles.

626 F.2d at 26; United States v. Burns, 624 F.2d 95, 101 (10th Cir. 1980). But the passenger's reasonable expectation of privacy does not extend to the airspace surrounding that luggage. United States v. Venema, supra, 563 F.2d at 1005; United States v. Bronstein, supra, 521 F.2d at 461. [7] It is undisputed that, had one of the DEA agents through the use of his olfactory sense detected the odor of the controlled substances in the suitcases, a search would not have occurred. United States v. Sullivan, supra, 624 F.2d at 13. The agents' use of a canine's more enhanced (through training) olfactory sense cannot convert

7. Although the Courts in Bronstein and Sullivan concluded that, because of current airport security measures passengers have no reasonable expectation of privacy in their checked luggage (Sullivan, supra, 625 F.2d at 13; Bronstein, supra, 521 F.2d at 462), we decline to reach that conclusion.

a sniff of the exterior of those suitcases into a search. Id.

Moreover, the agents' initial removal of appellants'luggage from the National Airlines baggage cart did not violate the constitutional rights of Kern and Goldstein. Our review of the record reveals that the DEA agents were in the semi-public baggage area with the permission of National. Once Kern and Goldstein released their luggage to the custody of the airlines, they could no longer control who actually handled their bags. We hold that, because the DEA agents' placement of the two bags in a position to be sniffed did not violate appellants' privacy interests in the contents of their bags, their actions in doing so did not constitute an unreasonable seizure within the meaning of the Fourth Amendment. See United States v.

Klein, supra, 626 F.2d at 26; United States v. Burns, supra, 524 F.2d at 101; see also, United States v. Venema, supra, 563 F.2d at 1006.

We agree with appellants that reasonable suspicion is necessary to justify an investigatory stop and that an individual's manifestation of certain drug courier profile characteristics, without more, does not constitute reasonable suspicion. Reid v. Georgia, ___U.S.___, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980)(per curiam); United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979), cert. denied, ___U.S.___ 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980)(two justices dissenting). [8] But Zeke's sniff of

8. The Supreme Court has not yet set the standard for determining when an investigatory stop constitutes a seizure under the Fourth Amendment. See United States v. Robinson, supra, 625 F.2d at 1215; United States v. Bowles, 625 F.2d 526,
(Footnote continued on following page.)

appellants' luggage is not the equivalent of an investigatory stop for the simple reason that the use of Zeke constituted neither a search nor a seizure under the Fourth Amendment. It is because Zeke's sniff did not constitute a search within the meaning of the Fourth Amendment that we hold that reasonable and articulable suspicion is not required before a DEA agent may use a canine to sniff luggage

(Footnote continued from previous page.) 530-31 (5th Cir. 1980). The Fourth Amendment requires an objective justification for a search or seizure; because any number of profile characteristics can be exhibited by individuals innocent of any wrongdoing, the profile, without more, cannot serve as the justification for an investigatory stop. United States v. Ballard, supra, 573 F.2d at 916. See Smith v. Maryland, 442 U.S. 735, 745-46, 99 S.Ct. 2577, 2582-83, 61 L.Ed.d2d 220 (1979); Torres v. Puerto Rico, 442 U.S. 465, 471, 99 S.Ct. 2425,2429, 61 L.Ed.2d 1 (1979).

in the custody of a common carrier. [9] Consequently, we do not have to reach the issue of whether Agent Maroney's decision to subject appellants' luggage to a sniff by Zeke was based on a reasonable and articulable suspicion. [10]

Furthermore, once Zeke positively reacted to the presence of drugs in the Goldstein bag, that reaction along with

9. If we were to hold that Zeke's sniff did constitute a search or seizure, the Government's action would have to be justified on grounds recognized by the Fourth Amendment. However, when the Government's actions do not constitute a search or seizure under the Constitution, such justifications are not required.

10. It should be noted that Agent Maroney's observation that Kern and Goldstein met certain profile characteristics, coupled with his observation that the names of the bags (Kern and Goldstein) and the names on the tickets (M. Kern and J. Kern) were inconsistent, would probably meet the reasonable suspicion standard. Conduct that would appear wholly innocent to an untrained observer may be assessed as suspicious by a trained narcotics agent. See United States v. Bowles, supra, 625 F.2d at 533.

the other facts present supplied the DEA agents with the requisite probable cause to seek a warrant in order to search the luggage and to arrest Kern and Goldstein. United States v. Klein, supra, 626 F.2d at 27; United States v. Sullivan, supra, 625 F.2d at 13. [11] Appellants further contend that Agent Maroney's supporting affidavit for the search warrant was deficient because it did not allege details about Zeke's training or reliability. However, our review of the affidavit shows that Agent Maroney's allegations with respect to Zeke's quali-

11. If Agent Maroney had searched Goldstein's bag without a warrant, such a search would have been unreasonable. Since the appellants were in custody at that point, there were no exigent circumstances to justify such a warrantless search; further, such a search would not have been an incident to the arrests under these circumstances. See, e.g., United States v. Chadwick, 433 U.S. 1,13, 97S.Ct. 2476, 2484, 53 L.Ed.2d 538 (1976); United States v. Dien, 609 F.2d 1038,1045 (2d Cir. 1979).

fications were sufficient. United States v. Klein, supra, 626 F.2d at 27; United States v. Venema, supra, 563 F.2d at 1007.

Since Kern gave his consent to have his bag searched after he was in a custodial setting, the Government has the burden of showing that his consent was voluntary. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). We conclude that the Government met its burden in showing that Kern's consent was voluntary, especially in light of all the attendant circumstances. On this point, it is significant that Kern and Goldstein were questioned in the same custodial setting at the same time; Kern could have followed Goldstein's example by refusing to consent to a search of the bag with his name on it.

III.

The remaining contentions involve the district court's denial of their motions of judgment of acquittal. Appellants argue that, because the Government did not introduce any specific evidence of distribution other than the amount of cocaine seized, the Government failed to prove possession with intent to distribute. However, this argument fails since the 559 grams of pure cocaine seized sufficiently support an inference of possession with intent to distribute. See United States v. Grayson, 625 F.2d 66 (5th Cir. 1980); United States v. Vomero, 567 F.2d 1315 (5th Cir. 1978).

Finally, appellant Kern argues that the Government failed to prove that he had possession of Goldstein's suitcase, either actual or constructive. However, this argument borders on the frivolous in

view of Kern's actions regarding the suitcase tagged with Goldstein's name. The agents observed Kern bringing the suitcase into the terminal where he exercised actual control and dominion over it until he gave the larger bag to Goldstein. Kern's general behavior, together with the other facts, would support the inference that Kern at the time he had actual control over the suitcase was aware that it contained the contraband. Furthermore, possession of contraband may be constructive as well as actual and may be proven by circumstantial evidence. See e.g., United States v. Riggins, 563 F.2d 1264,1266 (5th Cir. 1977), cert. denied, 439 U.S. 878, 99 S.Ct. 148, 58 L.Ed.2d 150 (1978). Reviewing the evidence as a whole, we conclude that it was amply sufficient to support Kern's conviction for possession

of the cocaine. United States v. Johnson, 469 F.2d 973,977 (5th Cir. 1972).

Because appellants' contentions are without merit, we hold that the district court was correct in denying appellants' motion to suppress and their motions for judgment of acquittal. Thus the convictions of Kern and Goldstein are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 79-5531

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BERNNETT GOLDSTEIN and
JAMES EDWARD KERN,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 1026081, 5 Cir. 198_, ___F.2d___.

(February 25, 1981)

Before KRAVITCH and FRANK M. JOHNSON, JR., Circuit Judges, and ALLGOOD, District Judge.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor

Judge of this Administrative Unit in regular active serivce having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

[Frank M. Johnson, Jr.]
United States Circuit Judge

*District Judge of the Northern District of Alabama, sitting by Designation.